

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	File No. 99090433
	)	
<b>INFINITY RADIO LICENSE, INC.</b>	)	NAL/Acct. No. 2001320800008
	)	FRN: 0004-0367-11
Licensee of Station WLLD(FM),	)	Facility ID # 18527
Holmes Beach, Florida	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 4, 2004**

**Released: March 18, 2004**

**By the Commission:** Commissioner Martin concurring and issuing a statement; Commissioner Adelstein issuing a statement; and Commissioner Copps dissenting and issuing a statement.

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we deny an Application for Review, filed on October 28, 2002, by Infinity Radio License, Inc. (“Infinity”), licensee of Station WLLD(FM), Holmes Beach, Florida. Infinity seeks review, pursuant to 47 C.F.R. § 1.115, of a *Memorandum Opinion and Order*<sup>1</sup> (“*MO&O*”) issued by the Chief, Enforcement Bureau (“Bureau”). The *MO&O* denied Infinity’s Petition for Reconsideration of a *Forfeiture Order*<sup>2</sup> that imposed a monetary forfeiture penalty in the amount of Seven Thousand Dollars (\$7,000.00) against Infinity for a willful violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, which prohibit the broadcast of indecent material between 6 a.m. and 10 p.m.

**II. BACKGROUND**

2. On September 11, 1999, Station WLLD(FM) (“Station”) broadcast a live rap/hip-hop concert called “The Last Damn Show.” The broadcast generated a complaint, which included a tape recording of the entire show, as well as a transcript and related tape recording of those portions of the program which the complainant deemed most offensive. The Bureau ultimately imposed, and affirmed on reconsideration, a forfeiture for the Station’s broadcast of repeated graphic references to oral sex:

God damn, where are my pussy eating niggers? Any my niggers into eating pussy? Y’ll make some noise. Hey, where are my girls? If you’re eating pussy, where you at? That’s it. Oh, they all like it. I ain’t eating no pussy tonight. If you all don’t like it, fuck it. I ain’t going to beg you. You like it?

3. In its Application for Review, Infinity contends that the *MO&O* provided no support for rejecting without comment Infinity’s argument that the sexual import of the material was not

<sup>1</sup> *Infinity Radio License, Inc.*, 17 FCC Rcd 18339 (EB 2002).

<sup>2</sup> *Infinity Radio License, Inc.*, 16 FCC Rcd 4825 (EB 2001) (“*Forfeiture Order*”).

inescapable to children. Infinity also asserts that the *MO&O* ignored critical contextual factors, the consideration of which would have supported a finding that the material was not indecent. Infinity faults the *MO&O* for not explaining why changing contemporary community standards do not render acceptable the material broadcast on Station WLLD(FM). Finally, Infinity argues that Supreme Court decisions in *Reno v. ACLU*<sup>3</sup> and *Ashcroft v. Free Speech Coalition*<sup>4</sup> render the Commission's generic indecency definition facially unconstitutional, and, at the least, require proof of a proximate link between broadcast indecency and harm to children.

### III. DISCUSSION

4. After reviewing Infinity's Application for Review and the record in this matter, we find no reason to reverse the *MO&O*. Applying our indecency standard,<sup>5</sup> we agree with the Bureau that the material cited in the *MO&O* was indecent. Consequently, we deny the Application for Review and affirm the forfeiture assessed by the Bureau.

#### A. The Cited Material Had an Inescapable Sexual Meaning.

5. We reject Infinity's argument that the cited material did not have an inescapable sexual meaning.<sup>6</sup> The phrase "eating pussy" has but one meaning in common parlance; it refers to a specific oral sexual activity. Infinity does not suggest any other meaning, much less a non-sexual one. Having reviewed the tape and transcript, we believe it beyond argument that the cited material described a sexual activity. We therefore reject Infinity's contention that the Station WLLD(FM) and Station WRLR(FM)<sup>7</sup> broadcasts are "similarly situated" and warrant the same treatment.

6. Infinity argues that we must produce evidence that the broadcasts had an inescapable sexual meaning to children.<sup>8</sup> We disagree. The courts have held that the Commission is justified in concluding that the government's interest in protecting children from exposure to indecent material extends to minors of all ages, who are defined as under the age of 18 years.<sup>9</sup> Given the explicit references and the graphic manner in which the material described sexual activity, there is no non-sexual meaning that a 17 year-old listener, who is within the class of "children"

---

<sup>3</sup> 521 U.S. 844 (1997).

<sup>4</sup> 122 S. Ct. 1389 (2002).

<sup>5</sup> See *In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8000, ¶ 4 (2001) ("*Indecency Guidelines*"). Indecent material is "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."

<sup>6</sup> Application for Review, p. 4.

<sup>7</sup> The complaint against WRLR(FM) was dismissed because it provided no information that could reasonably support a conclusion that the alleged use of the word "pussy" referenced a sexual organ or was used in connection with a sexual activity.

<sup>8</sup> Application for Review, p. 3.

<sup>9</sup> See *Action for Children's Television v. FCC*, 58 F.3d 654, 664 D.C. Cir. 1995), *cert. denied*, 516 U.S. (1043) (1996) ("*ACT III*").

protected by our indecency rule, could have attributed to these terms.<sup>10</sup>

B. The Context of the Broadcast Does Not Render the Material Not Indecent.

7. With respect to context, Infinity submits, without offering any support whatsoever, that, by carrying the concert live and uncut, Station WLLD(FM) did not intend to shock, pander or titillate, but rather sought to convey the street legitimacy of the various artists. In addition, Infinity asserts that the Station's broadcast of "The Last Damn Show" is less problematic than the broadcast of a tape recording of John Gotti's expletive-laced conversation, which the Commission found not to be indecent.<sup>11</sup>

8. As the *Forfeiture Order* accurately observed, "the speaker [broadcast over Station WLLD(FM)] repeatedly and unmistakably asks the audience in patently offensive terms whether they perform or enjoy a type of oral sex."<sup>12</sup> The utterances, although apparently spontaneous and not related to the performance of any song, occurred during a live rap/hip-hop concert, during which artists and other speakers repeatedly used expletives. The Station apparently took no precautions with respect to this material but opted to broadcast all material uttered at the concert regardless of its suitability for broadcast.<sup>13</sup> In light of these circumstances, we conclude that, regardless of what the speaker may have intended to convey to the concert's audience, the licensee should not have broadcast before 10 p.m. repeated indecent utterances. In the instant case, the cited material clearly and repeatedly refers to an oral sexual activity; thus it was neither fleeting nor isolated.<sup>14</sup> Further, the language broadcast describes the sexual activity in a graphic, explicit, crude and vulgar manner. Consequently, even if we were to conclude that the licensee's apparent purpose for broadcasting the cited material was not to pander, titillate or shock – which we do not – we note that "the absence of a pandering or titillating nature ... will not necessarily prevent an indecency determination...."<sup>15</sup>

9. We thus disagree with Infinity's contention that, because the cited material was aired during a live event, the material became not indecent. Unquestionably, the material described a sexual activity. The description was not clinical or educational; rather, it was graphic and vulgar.<sup>16</sup> Infinity could have prevented, but did not prevent, its broadcast. By comparison, the utterances cited in *Branton* were not presented in a vacuum, but during a news story concerning

---

<sup>10</sup> See *Sagittarius Broadcast Corporation*, 7 FCC Rcd 6873, 6874, ¶ 9 (MMB 1992) (subsequent history omitted) (salient question is whether sexual import was inescapable and understandable not only to adults but especially to children).

<sup>11</sup> See *Peter Branton*, 6 FCC Rcd 610 (1991) (subsequent history omitted) (Newscast concerning the criminal trial of an organized crime boss, featuring a taped conversation played during the trial, which used variations of the "F-word" repeatedly) (subsequent history omitted).

<sup>12</sup> *Forfeiture Order*, *supra* note 2, 16 FCC Rcd at 4826, ¶ 7.

<sup>13</sup> See *CBS Radio License, Inc.*, 15 FCC Rcd 23881, 23883, ¶ 8 (EB 2000).

<sup>14</sup> By comparison, see *Indecency Guidelines*, *supra* note 5, 16 FCC Rcd at 8008-09, ¶¶ 17-18.

<sup>15</sup> *Id.*, 16 FCC Rcd at 8014, ¶ 23.

<sup>16</sup> By comparison, the Commission has cited as not indecent sexually explicit material that was presented in a clinical or instructional, as opposed to a pandering, titillating or vulgar, manner. See *id.*, 16 FCC Rcd at 8011-12, ¶ 21.

organized crime. Listeners were warned about the rough language and informed, *inter alia*, that Mr. Gotti's words came from a wiretap recording of material that the government had used as evidence at Mr. Gotti's trial.

C. The Arguable Social Merit of the Broadcast Does Not Preclude an Indecency Finding.

10. Infinity also argues that the *MO&O* ignored a second important contextual factor – the merits of the concert. Infinity contends that “The Last Damn Show” was a major artistic and cultural event in Tampa and that the Commission is constitutionally barred from drawing a distinction between the cited material and material that the Commission believes may be of greater cultural or “serious” merit.<sup>17</sup> Infinity appears to claim both that the Bureau ignored the concert's relative merit and that, nevertheless, the Commission is constitutionally forbidden from drawing a distinction between the merit of the “The Last Damn Show” and some other, arguably more serious, material. We do not read the cases cited by Infinity to support these apparently contradictory propositions of law. Neither *Hustler* nor *Cohen* involved broadcast indecency. The former concerned the possible liability of a magazine and its publisher for the tort of intentional infliction of emotional distress when the person allegedly attacked in print was a public figure. The latter concerned the constitutionality of a criminal conviction for wearing a jacket bearing offensive wording in a public setting. The court's holdings in each case clarified the limitations imposed by the First Amendment<sup>18</sup> on a state's power to punish offensive speech in two non-broadcast contexts. By comparison, it is well settled that broadcasters do not have unlimited rights to air indecent material, even if the material has “merit.”<sup>19</sup>

11. The *Indecency Guidelines* advise that the full context in which broadcast material appears is critically important in determining whether that material is patently offensive.<sup>20</sup> Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.<sup>21</sup> In examining these three factors, it is necessary to weigh and balance them to determine whether the broadcast material is patently offensive because “[e]ach indecency case

---

<sup>17</sup> Application for Review, p. 8, citing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) and *Cohen v. California*, 403 U.S. 15, 26 (1970).

<sup>18</sup> U.S. CONST., amend. I.

<sup>19</sup> See *Indecency Guidelines*, *supra* note 5, 16 FCC Rcd at 8000, ¶ 4 and n. 8. See also *Infinity Broadcasting Corporation of Pennsylvania (WYSP(FM))*, 3 FCC Rcd 930, 932, ¶ 17 (1987), *aff'd in part, vacated in part on other grounds, remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) (“*ACTP*”) (“Some material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value. [Footnote omitted] Since the overall value of a work will not necessarily alter the impact of certain words and phrases on children, the FCC's approach is permissible under controlling case law: merit is properly treated as a factor in determining whether material is patently offensive, but does not render such material *per se* not indecent.”).

<sup>20</sup> *Indecency Guidelines*, *supra* note 5, 16 FCC Rcd at 8002, ¶ 9.

<sup>21</sup> *Id.*, 16 FCC Rcd at 8003, ¶ 10.

presents its own particular mix of these, and possibly other, factors....”<sup>22</sup> In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,<sup>23</sup> or, alternatively, removing the broadcast material from the realm of indecency.<sup>24</sup> The “merit” of a work is one of many variables that make up a work’s context; however, the presence of artistic or social merit does not preclude a finding that material is indecent.<sup>25</sup> Thus, regardless of whether there was artistic or social merit to “The Last Damn Show,” we may still find that the material broadcast by Station WLLD(FM) was indecent if, after weighing and balancing all pertinent factors, we conclude that the material is patently offensive.<sup>26</sup> Because we agree with the Bureau that the cited material was explicit, graphic and repeated, we also conclude that, even after factoring in the concert’s merit, as described by Infinity, the Bureau correctly determined that the material was patently offensive.

D. The Bureau Applied the Proper Test of Contemporary Community Standards.

12. We find no error in the *MO&O*’s decision not to address again the *Forfeiture Order*’s observation that the relevant test for determining contemporary community standards is not the popularity of the speakers or the event but whether the material is patently offensive for the broadcast medium.<sup>27</sup> We also disagree with Infinity’s apparent belief that it can broadcast with impunity anything uttered during “The Last Damn Show” because such utterances were acceptable to the attendees of the concert and those who chose to listen to the performance’s broadcast. Our *Indecency Guidelines* advise that the community standard for the broadcast medium is “that of the average broadcast viewer or listener.”<sup>28</sup> We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium. Applying the test of the average broadcast listener to the material at issue, we are satisfied that he or she would find it patently offensive for the broadcast medium.<sup>29</sup> Thus, we conclude that the nation’s ever-changing contemporary community standards have not yet reached the point where the cited material is acceptable broadcast fare.

---

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, 16 FCC Rcd at 8009, ¶ 19 (citing *Tempe Radio, Inc (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid) (same).

<sup>24</sup> *Indecency Guidelines*, *supra* note 5, 16 FCC Rcd at 8010, ¶ 20 (“the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding”).

<sup>25</sup> See note 19, *supra*.

<sup>26</sup> *Infinity Broadcasting Corp. of Pennsylvania (WYSP(FM))*, *supra* note 19, 3 FCC Rcd at 932, ¶ 17.

<sup>27</sup> *Forfeiture Order*, *supra* note 2, 16 FCC Rcd at 4827, ¶ 8.

<sup>28</sup> *Indecency Guidelines*, *supra* note 5, 16 FCC Rcd at 8002, ¶ 8.

<sup>29</sup> We also note that, separate and apart from our affirmance of the Bureau forfeiture, the broadcast also included repeated use of the “F-word.” Had this issue been presented to the full Commission in the first instance, we would also have found that repeated use of the “F-word” in this context was indecent.

E. The Commission's Indecency Standard Is Constitutional.

13. Infinity argues that the Commission's indecency standard is facially unconstitutional, citing *Reno v. ACLU*<sup>30</sup> and *Ashcroft v. Free Speech Coalition*.<sup>31</sup> The courts, however, have repeatedly found otherwise.<sup>32</sup> Moreover, as we have previously indicated, neither *Reno* nor *Ashcroft* alters this conclusion nor requires that we prove actual harm to children before we can impose a forfeiture for broadcasting indecent material outside of the safe harbor hours of 10 p.m. to 6 a.m.<sup>33</sup>

**IV. ORDERING CLAUSES**

14. ACCORDINGLY, IT IS ORDERED that, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed on October 28, 2002, by Infinity Radio License, Inc. IS DENIED.

15. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the "Federal Communications Commission" to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Number (FRN: 0004-0367-11) referenced above, and also should note the NAL/Acct. No. (2001320800008). If the forfeiture is not paid within thirty (30) days of the release of this Memorandum Opinion and Order, the case may be referred to the Department of Justice for collection pursuant to 47 U.S.C. § 504(a).

16. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>34</sup>

17. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order shall be sent by certified mail, return receipt requested, to counsel for Infinity: Steven A. Lerman, Esq., Leventhal, Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

---

<sup>30</sup> *Supra* note 3.

<sup>31</sup> *Supra* note 4.

<sup>32</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 750-51 (1978); *ACT III*, *supra* note 9, 58 F.3d at 657-59; *ACT I*, *supra* note 19, 852 F.2d at 1338-40.

<sup>33</sup> *See Infinity Broadcasting Operations, Inc. ("WKRK-FM")*, Apparent Liability for Forfeiture, Forfeiture Order, \_\_ FCC Rcd \_\_ ¶ 5 and n. 8 (2003).

<sup>34</sup> *See* 47 C.F.R. § 1.1914.

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, Florida, Memorandum Opinion and Order*

In this decision, the majority upholds the Enforcement Bureau's decision to fine Infinity \$7000 for airing graphic and explicit sexual content that clearly violates the statutory prohibition on broadcasting obscene, indecent, or profane language.

This decision highlights serious problems with way the Commission carries out its statutory enforcement responsibilities. The timeline of this complaint demonstrates clearly why many consider the Commission's enforcement to be ineffective. Many complaints languish for a year or more without any action. But this case shows that even after the first Notice is issued, the delays are just beginning:

- September 1999 -- the program aired.
- December 2000 -- the Enforcement Bureau issues the initial Notice of Apparent Liability *fifteen months* later.
- March 2001 -- the Bureau releases its Forfeiture Order *three months* later.
- September 2002 -- the Bureau takes *another year and a half* to address Infinity's reconsideration petition.
- March 2004 -- *a year and a half* after that, the Commission is finally addressing this case -- *four and a half years* after this program was broadcast.

And when this agency finally acts, the penalties it imposes are woefully inadequate. The vulgar and explicit nature of the indecency and profanity that was broadcast gives the FCC the obligation to take serious action. Instead, the majority upholds a fine of \$7000. Such a fine does not even rise to a cost of doing business for this multi-billion dollar conglomerate.

It is small wonder that Americans across this country are dissatisfied with the Commission's enforcement of these statutes against obscenity, indecency, and profanity. How do we change this situation? First, we must begin to assess truly meaningful fines. Second, the more outrageous cases should be sent to hearings for possible revocation of licenses. Third, the Commissioners themselves, rather than the Bureau should be making these decisions. Issues of indecency on the people's airwaves are important to millions of Americans. I believe they merit, indeed compel, Commissioner-level action. And finally, the Commission should set a deadline for action on all obscenity, indecency, and profanity complaints. Congress has taken notice of this problem and is already moving

forward to set such deadlines for the Commission. The Energy and Commerce Committee of the United States House of Representatives voted just last week to require the Commission to act on complaints within 180 days and to issue forfeitures within 270 days. Although I applaud the decision to provide a deadline for Commission action, I urge my colleagues not to wait for legislation to get our indecency enforcement house in order.

**CONCURRING STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN**

*Re: Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, FL,  
Memorandum Opinion and Order*

This broadcast included numerous indecent utterances. Infinity, the licensee, has a long history of repeated violations. The Bureau's proposed \$7,000 fine is inadequate; each violation in this broadcast deserves a much higher fine. We should have issued a new Notice of Apparent Liability today for a fine at least ten times higher.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, Florida; Memorandum Opinion and Order*

I support this Order affirming a forfeiture for the broadcast of indecent material at a time when children may be in the audience. Were I acting on a clean slate, I would have imposed a higher fine given the nature of the broadcast and the licensee's history. Nevertheless, recognizing that four and a half years have already passed since this broadcast, I am reluctant to start the process anew. The unnecessary delay in this case is regrettable. Such delay can impede the Commission's ability to meet our obligation to enforce statutory and regulatory provisions restricting broadcast indecency.

Since I arrived at the Commission, we have greatly stepped up our enforcement against indecent broadcasts. I expect that these stepped-up actions will convince broadcasters that they cannot ignore their responsibility to serve the public interest and to avoid the broadcast of indecent material over the public airwaves.